

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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UNITED STATES OF AMERICA, : Case No. 1:16-cr-00224
: Cleveland, Ohio
Plaintiff, :
:
v. : Wednesday,
: February 1, 2023
BOGDAN NICOLESCU, :
RADU MICLAUS, :
:
Defendants. :
-----X

TRANSCRIPT OF RESENTENCING PROCEEDINGS
BEFORE THE HONORABLE PATRICIA A. GAUGHAN
UNITED STATES CHIEF DISTRICT JUDGE

Court Reporter: Donnalee Cotone, RMR, CRR, CRC
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United States District Court
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Proceedings recorded by mechanical stenography, transcript
produced by computer-aided transcription.

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1 MORNING SESSION, Wednesday, February 1, 2023

2 (Proceedings commenced at 11:47 a.m.)

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4 COURTROOM DEPUTY: All rise.

11:47:29 5 THE COURT: Please be seated.

6 We are here in the matter of *United States of America*
7 *v. Bogdan Nicolescu and Radu Miclaus*, Case Number
8 1:16-cr-224.

9 Present in court is Mr. Nicolescu; is that correct,
11:48:03 10 sir?

11 DEFENDANT NICOLESCU: Yes. Yes.

12 THE COURT: Represented by his attorney,
13 Mr. Michael Goldberg.

14 MR. GOLDBERG: Good afternoon, Your Honor.

11:48:11 15 THE COURT: Also present is Mr. Miclaus; is
16 that correct?

17 DEFENDANT MICLAUS: Yes, ma'am.

18 THE COURT: Represented by his attorney,
19 Mr. Michael O'Shea.

11:48:21 20 MR. O'SHEA: Good morning, Your Honor.

21 THE COURT: Good morning.

22 On behalf of the Government is Mr. Duncan Brown and
23 Mr. Brian McDonough.

24 MR. BROWN: Good morning, Your Honor.

11:48:28 25 THE COURT: Good morning.

1 We are here today for purposes of a resentencing.

2 Let me briefly recap. As to Count Group 1,
3 specifically Counts 1 through 15 and 21, this Court found a
4 total offense level of 43. But because with a criminal
11:49:00 5 history category of I, the guideline imprisonment range is
6 life imprisonment, which exceeds the statutory maximum of 20
7 years, I gave a technical, legal reduction by five levels
8 resulting in a 38 and a I. That was the first total offense
9 level in Criminal History Category I that incorporates the
11:49:44 10 statutory maximum of 240 months.

11 The Sixth Circuit affirmed the convictions, and the
12 Sixth Circuit affirmed all sentencing challenges except
13 receiving and selling stolen credit card accounts, two
14 levels, and a conviction under 18 U.S.C.

11:50:14 15 Section 1030(a)(5)(A), four levels, for a total of six
16 levels.

17 The 43 minus the six would have given us a total
18 offense level of a 37 and a I. That range is 210 to 262.
19 And because of the statutory maximum, the range is really
11:50:56 20 technically 210 to 240. This Court, therefore, would not
21 have had to depart legally in order to accommodate that
22 240-month maximum had this Court not given the six levels
23 that the Sixth Circuit has said now is improper.

24 Now, the Sixth Circuit acknowledged in the opinion
11:51:31 25 that I did, in fact, sentence both defendants below the

1 range of 235 to 293, the 38 and a I, and specifically
2 acknowledges that Mr. Nicolescu received a sentence within
3 the new range of 210 to 262, specifically a sentence of 216
4 months.

11:52:03 5 The Sixth Circuit acknowledged that Mr. Miclaus
6 received a sentence below the new range of 210 to 262.
7 Specifically, the Court gave a sentence of 192.

8 Now, again, I reiterate, I am speaking as to Count
9 Group 1. We all know that both defendants received an
11:52:31 10 additional 24 months due to the remaining counts.

11 Even though the Sixth Circuit acknowledged that both
12 defendants received either a sentence within the new range
13 or below the range, the Sixth Circuit stated, we still must
14 remand for resentencing.

11:52:54 15 I have briefs from all parties involved. It is the
16 Government's position that this is a limited remand, and,
17 therefore, this Court should not be conducting a de novo
18 review.

19 Mr. Goldberg, on behalf of his client, is arguing that
11:53:23 20 it is not a limited remand, but rather, the Court must
21 conduct a de novo review.

22 Mr. O'Shea, on behalf of his client, disagrees with
23 his codefendant's position, and instead, agrees with the
24 Government's position. Therefore, this Court must make a
11:53:50 25 determination of whether or not this matter is before the

1 Court on a limited remand, or if I must conduct a de novo
2 review.

3 During a resentencing, District Courts in the
4 Sixth Circuit can review sentencing matters de novo unless
11:54:23 5 the remand order specifically limits the Court's authority
6 at resentencing. In other words, the remand order may be
7 limited or it may be general.

8 If the remand is general in nature, then the District
9 Court can visit all aspects of the sentencing. If the
11:54:45 10 remand order is limited, the District Court's authority
11 extends only to the directives set forth by the Court of
12 Appeals. In the absence of a specific limitation, remand
13 orders are presumptively general. A remand order is limited
14 only if the language used by the Court of Appeals is
11:55:12 15 unmistakable. The language must convey the intent to limit
16 the scope of the District Court's review. I quote
17 *United States v. McFalls*, 675 F.3d 599, Sixth Circuit 2012
18 case.

19 This intent is achieved by outlining the procedure the
11:55:35 20 District Court is to follow articulating the chain of
21 intended events with particularity and leaving no doubt as
22 to the scope of the remand.

23 I find that the remand order issued by the
24 Sixth Circuit in this case to be a general order of remand,
11:55:55 25 and, therefore, this Court must conduct a de novo

1 sentencing.

2 In the Sixth Circuit opinion, the Court indicated, and
3 I quote, "It is for the District Court to decide whether
4 starting from the correct guidelines range a downward
11:56:14 5 variance remains appropriate."

6 This Court does not find that the language is
7 unmistakably limiting the Court's authority. Rather, it
8 appears that the Sixth Circuit simply indicated that it is
9 for the District Court and not the Court of Appeals to
11:56:33 10 decide this issue. The opinion also remanded the matter,
11 "So that defendants can be resentenced under a correctly
12 calculated guidelines range."

13 I do not find that this language shows an intent to
14 limit this Court's authority at resentencing, nor does it
11:56:57 15 state with particularity the chain of events or proceedings
16 that this Court must engage in on remand. My conclusion is
17 bolstered by the fact that ultimately, the Sixth Circuit
18 remanded this matter for resentencing without appending any
19 restrictive language.

11:57:20 20 I'm just going to leave it at that.

21 So I am now prepared to go through the presentence
22 investigation report as to each defendant and proceed with a
23 de novo review.

24 MR. GOLDBERG: Your Honor, thank you.

11:57:50 25 May it please the Court: Given that this is going to

1 be a de novo review, and there are sentencing issues that my
2 client would like to develop more fully given this chance to
3 do so, we would ask that, at least with regard to
4 Mr. Nicolescu, that this Court continue his sentencing
11:58:10 5 hearing to give us sufficient time to review the arguments
6 and prepare a thorough, complete sentencing memoranda.

7 THE COURT: And I will state that you did, in
8 fact, inform this Court through a staff member that in the
9 event the Court found it to be a general order of remand,
11:58:40 10 that you were going to request this.

11 So I certainly was put on notice, and I understand the
12 Government was put on notice as well.

13 MR. BROWN: Yes, Your Honor.

14 THE COURT: And what is your position?

11:58:53 15 MR. BROWN: Your Honor, our position would be
16 on de novo, we obviously would ask the Court to incorporate
17 by reference and consider as evidence the transcript from
18 the original sentencing.

19 But in terms of a request for more time to develop the
11:59:10 20 defendant's argument by Mr. Goldberg, we would -- we have no
21 objection to that, just for Mr. Goldberg. And also, so we
22 can produce Mr. -- Special Agent Macfarlane who is in
23 Australia now by Zoom.

24 THE COURT: Mr. Goldberg, you understand we
11:59:29 25 have -- we had a full hearing on this issue at the first

1 sentencing and Agent Macfarlane did, in fact, testify, and
2 his testimony is cited throughout the Sixth Circuit opinion.
3 I'm assuming that you would also agree that all of the
4 evidence presented by all parties would be incorporated into
11:59:52 5 the resentencing.

6 Is that sufficient for you so we can proceed today?

7 MR. GOLDBERG: Your Honor, that would not be
8 sufficient from our point of view. I'm sure it would be
9 sufficient for the Government. But my client and I do need
12:00:14 10 to work on some arguments that were not really apparent two
11 or three years ago that are apparent now. And if the matter
12 is going to be reopened, we would like to address them
13 fully. So we wouldn't be able to go forward today.

14 But we would not object to the Court incorporating
12:00:36 15 Agent Macfarlane's prior testimony and whatever the
16 Government wants to add to that, augment it through
17 testimony, they will do so, and we will respond.

18 And for the record, we don't object to Macfarlane --
19 Agent Macfarlane appearing by electronic means, if that's
12:00:58 20 what the Government needs to do.

21 THE COURT: I understand he is out of the
22 country.

23 MR. BROWN: That's correct, Your Honor.

24 THE COURT: So you would be asking that.

12:01:07 25 MR. BROWN: Yes.

1 THE COURT: So what I'm hearing you say is
2 that you are going to be asking me to go below the loss
3 amount that is referenced in the Court of Appeals' opinion,
4 and you, Government, will be asking me to go above that
12:01:29 5 amount.

6 Is that basically what I am hearing here?

7 MR. GOLDBERG: That's correct, Your Honor.

8 MR. BROWN: Your Honor, the Government's
9 position is at a de novo hearing, we will ask you for a
12:01:39 10 higher loss amount and whatever else is warranted by the
11 evidence.

12 THE COURT: Okay.

13 MR. BROWN: Thank you.

14 THE COURT: All right. Well, because you had
12:01:51 15 put me on notice regarding this issue, and because there is
16 no objection, I will grant your continuance.

17 I am going to -- the Government has the burden, as
18 always, on this issue. Your brief is due February 24th, and
19 I'm going to call it a supplemental briefing.

12:02:19 20 Mr. Goldberg, yours will be due March 3rd.

21 Any reply brief will be due March 10th. I will set
22 the hearing for March 22nd at 9:30.

23 Turning to the Government, do you have any problems
24 with any of those dates?

12:02:37 25 MR. BROWN: No, Your Honor. Thank you very

1 much. That allows us to coordinate with Special Agent
2 Macfarlane adequately.

3 Thank you.

4 THE COURT: Mr. Goldberg --

12:02:46 5 MR. GOLDBERG: No, Your Honor.

6 THE COURT: -- any problem with any of those
7 dates?

8 MR. GOLDBERG: At this point, Your Honor, no
9 problem with the dates, and we appreciate the consideration.

12:02:55 10 THE COURT: All right.

11 Now, Mr. O'Shea, are you joining in on the motion to
12 continue?

13 MR. O'SHEA: No.

14 THE COURT: You are asking that this Court
12:03:10 15 proceed today, understanding my ruling of a de novo review?

16 MR. O'SHEA: Yes.

17 THE COURT: Mr. Miclaus, did you understand
18 what I asked your lawyer?

19 DEFENDANT MICLAUS: Yes. Yes, Your Honor.

12:03:30 20 THE COURT: And are you in agreement that you
21 are not seeking a continuance?

22 DEFENDANT MICLAUS: Yes, I'm in agreement.

23 THE COURT: You would like to proceed with
24 sentencing today?

12:03:42 25 DEFENDANT MICLAUS: Yes, Your Honor.

1 THE COURT: All right. We will do so, if you
2 would just give me a moment.

3 Mr. Goldberg, Mr. Brown, Mr. McDonough, I would like
4 to see you at sidebar.

5 (Discussion held at sidebar off the record.)

6 - - -

7 (End of sidebar discussion.)

8 THE COURT: Mr. Goldberg, on behalf of your
9 client, is there anything further?

12:04:49 10 MR. GOLDBERG: Your Honor, I just think I
11 should make a record about the consequences of this
12 resentencing that have been made known to Mr. Nicolescu.
13 This is his decision. He's been told that he could receive
14 a higher sentence, restitution, that this could be a poor
12:05:20 15 decision. He understands the consequences fully, and this
16 is his knowing and voluntary decision, and I just want the
17 record to reflect that.

18 THE COURT: And that is correct, is it not,
19 Mr. Nicolescu?

12:05:35 20 DEFENDANT NICOLESCU: That is correct,
21 Your Honor.

22 THE COURT: On behalf of the Government,
23 anything further relative to Mr. Nicolescu?

24 MR. BROWN: Nothing specific to Mr. Nicolescu.
12:05:44 25 Thank you very much.

1 THE COURT: All right. Gentlemen, you are all
2 set for today.

3 MR. GOLDBERG: Thank you.

4 (Pause in proceedings.)

12:06:57 5 MR. GOLDBERG: Thank you, Your Honor.

6 THE COURT: Certainly.

7 Mr. Miclaus, you may approach the podium with counsel.

8 In that this is a de novo sentencing, or review, I am
9 looking at the presentence investigation report, Document
12:07:25 10 Number 182. According -- and this is the same presentence
11 report we used at the original sentencing.

12 According to this report, the base offense level is
13 seven. According to the report, 20 levels are added for
14 loss. However, at the original sentencing, I determined
12:07:49 15 that the amount of loss should be reduced to 18 levels. And
16 I will, again, do that, unless the Government wishes to
17 argue otherwise in regards to this particular defendant.

18 MR. BROWN: No, Your Honor.

19 And, in fact, with regard to this particular
12:08:08 20 defendant, we would ask that the transcript from the
21 original sentencing and the record from the original
22 sentencing be incorporated in today's proceedings as if they
23 were happening today.

24 THE COURT: May I assume no objection?

12:08:23 25 MR. O'SHEA: No objection.

1 THE COURT: All right. Two levels are added
2 due to the number of victims.

3 Two more levels are added in that the defendant was in
4 the business of receiving and selling stolen property.
12:08:43 5 Those two levels will be now deducted given the
6 Sixth Circuit opinion.

7 Two more levels are added due to the fact that a
8 substantial part of the scheme was committed from Romania,
9 and the scheme involved sophisticated means.

12:09:03 10 Two more levels are added in that the offense involved
11 trafficking of unauthorized access devices.

12 Four levels are added in that the defendant was
13 convicted under 18 U.S.C. Section 1030(a)(5)(A). However,
14 pursuant to the Sixth Circuit opinion, those four levels
12:09:23 15 will be deleted.

16 We are, therefore, at Offense Level 31. Two levels
17 are added in that the defendant was convicted under 18
18 U.S.C. Section 1956.

19 Two more levels are added in that the offense involved
12:09:49 20 sophisticated laundering.

21 There are no victim-related adjustments.

22 Four levels are added for role in the offense.

23 No adjustment for obstruction of justice for an
24 adjusted offense level subtotal of 37.

12:10:05 25 There are no Chapter 4 enhancements, no acceptance of

1 responsibility, for a total offense level of 37. And that
2 is for Count Group 1.

3 Regarding Counts 16 through 20, the guideline range is
4 the statutory penalty, which is two years consecutive to any
12:10:33 5 other term of imprisonment.

6 The defendant has no criminal history points, which
7 correspond to a criminal history category of I.

8 Mr. O'Shea, do you have any objections to the manner
9 in which the guidelines have been applied given the changes
12:10:55 10 that I have articulated?

11 MR. O'SHEA: No objection, Judge.

12 THE COURT: And on behalf of the Government?

13 MR. BROWN: None, Your Honor.

14 Thank you.

12:11:01 15 THE COURT: On the issue of sentencing, do you
16 wish for me to turn to you first, Mr. O'Shea, or your
17 client?

18 MR. O'SHEA: My client first, Your Honor.

19 THE COURT: Mr. Miclaus, do you have anything
12:11:16 20 to say before I pronounce sentence?

21 DEFENDANT MICLAUS: Yes, Your Honor.

22 From the bottom of my heart, I regret everything I
23 have done, and I take full responsibility for my actions,
24 and I accept the punishment.

12:11:39 25 I want to apologize to the Court today. I want to

1 apologize to prosecution. I want to apologize to the agents
2 and all the investigators that worked on the case. It's a
3 big case, and I understand the work and hours they put in.
4 And I apologize to the victims because they were the ones
12:12:03 5 who suffered the most. And I'm sorry for everything I've
6 done and all the pain I caused.

7 Thank you.

8 THE COURT: Mr. O'Shea.

9 MR. O'SHEA: Judge, let me indicate first that
12:12:19 10 my understanding -- and perhaps my client can elaborate
11 further -- while at the institution that he's at right now,
12 which is a pretty significantly high security-based
13 institution, that he has nevertheless performed as an
14 exemplary prisoner. And I don't know if it's fair to argue
12:12:37 15 that now that we're back for resentencing. But I think it's
16 only fair to argue that.

17 And then secondly, when I look at 3553, and I look at
18 the sentence that you gave back on December 6th, 2019, you
19 indicated in your sentencing statement of reasons, Judge,
12:13:00 20 that functionally he was getting what I calculate to be
21 about a 19-month variance. And you identified the variance
22 as being related to the proffer that he gave early in the
23 case. And I know that we all scratched our heads pretty
24 heavily when he decided to go to trial, notwithstanding that
12:13:19 25 proffer. You know, and I told him today when we were

1 meeting that, you know, if he had done the -- what had been
2 offered back then, he'd be home in Romania right now,
3 ironically.

4 So I ask the Court, you know, whatever empathy the
12:13:36 5 Court and maybe even the Government can think about that.
6 He's done already six and a half years in prison for a guy
7 who has never been in trouble in his life.

8 Now, I laid out in our original sentencing memorandum
9 that we filed on January 31st where I think the Court should
12:13:54 10 go, and it's more of a, quite frankly, an equity argument
11 under 3553. There's some mathematical calculations that I
12 placed in there, Judge, including, you know, where one might
13 start from an equity standpoint to get to where the real
14 equitable guideline calculation should be. And I also
12:14:15 15 included a request that the Court carry forward the net
16 19-month variance that the Court gave us back in December
17 of 2019.

18 Now, to do what the Government wants you to do, Judge,
19 to me, the way I read the Court of Appeals' opinion is to
12:14:38 20 functionally ignore the import of that decision all
21 together. And they want to make it -- I think the
22 Government wants to make it a paper victory and nothing
23 more. And I don't want to say victory or loss, because it's
24 a matter of law, really, in the Court of Appeals' opinion.

12:14:57 25 So that six levels, or that -- you know, that minus

1 six-level net enhancement that we can apply has to be in the
2 soup of 3553 when it comes to issuing a sentence today based
3 upon the fact that those enhancements don't apply.

4 I feel relatively confident that when you issued that
12:15:19 5 sentence back in December of 2019, that those enhancements
6 went into the soup, the total mix of the totality of the
7 circumstances, including the variance and everything else in
8 the case.

9 So, obviously, I've asked the Court to get somewhere
12:15:34 10 down near a 32, you know, a new range, and that somewhere to
11 be 121 to 151 months, and then carry forward the variance of
12 19 months, and that gets us down, as we said in our brief,
13 to about 102 months.

14 Now, I understand that the Court has discretion when
12:15:52 15 it comes to following my path on that. But I wanted to lay
16 out to the Court that we are relying in large measure on two
17 things: I'm sorry. Three things:

18 One, the original sentence that was handed down in
19 December of 2019.

12:16:10 20 Two, the Court of Appeals' decision and what it
21 reflects and what the import of that is.

22 And, three, the math that goes into the guidelines.
23 And I feel confident that this Court relies in large measure
24 on how the guidelines work, how they work mechanically. And
12:16:31 25 in that regard, that mechanical aspect of the guidelines

1 says, you know, you got to start where you started back in
2 2019 and back down six levels.

3 So that's why I'm making this Level 32 argument,
4 because it seems empirical, objective, and fair based upon
12:16:53 5 what the Court of Appeals has said.

6 I feel -- and I don't want to speak for the Court.
7 Please don't take it that way. But I got to believe, Judge,
8 when you imposed that 216 net sentence back in December
9 of 2019, you were including those two, you know, what we
12:17:13 10 call the offense enhancement and the 1030 enhancement in
11 that calculation. And the Court of Appeals has said you
12 can't do that. With all due respect to everything else that
13 was affirmed in the case, you can't do that.

14 So in that regard, Your Honor, with all due respect to
12:17:29 15 the arguments that the Government has made in their brief,
16 it is clear that the message that we're being sent is that
17 you can't do that. And you can't just say -- and I think
18 the Government is asking you to do this, is that the big
19 Court of Appeals' opinion is a big so what. You get to
12:17:46 20 do -- you get to functionally get him back to where he was
21 in December of 2019. That seems fundamentally, academically
22 wrong given what the Court of Appeals has told us.

23 And, you know, obviously, you heard my client this
24 morning. I think we're still in the morning, Your Honor.
12:18:08 25 No, we're actually in the afternoon. I think what he said

1 to you just now like he said to you back in December is
2 real, not rehearsed. I think this is a guy who is
3 absolutely unconditionally sorry about what has happened.

4 And I didn't grow up in Romania. The Government
12:18:29 5 didn't grow up in Romania. I don't know what it would have
6 been like to have to grow up in a country where -- and as
7 you may recall a trial judge where they said just about
8 every kid in high school learns how to do this.

9 So I think it's kind of unfair for the Government just
12:18:46 10 to say, well, it's -- Mr. Miclaus should be treated the same
11 way a kid that grew up in the United States is. That's not
12 fair. And that's against the evidence, by the way,
13 including the witness they called to the stand.

14 So we're asking the Government -- and I know it's --
12:19:03 15 there's a level of discretion, or a great level of
16 discretion here, Judge, that you follow the roadmap that we
17 mathematically laid out in our brief and give deference to
18 the message -- the macro message given to us by the Court of
19 Appeals.

12:19:18 20 Thank you.

21 THE COURT: Mr. Brown.

22 MR. BROWN: Thank you, Your Honor.

23 First of all, the Government would, based on this
24 de novo review and resentencing, ask that the defendant be
12:19:31 25 held to be joint and severely liable in restitution with

1 defendant Danet to the amount of \$853,651.99. That is a
2 number derived from loss amounts of victims provided by the
3 Government in Danet's sentencing.

4 The Government would argue that this is not, in fact,
12:19:56 5 merely a paper victory. The Court of Appeals went through,
6 at great length, 27, 28 pages, going through all of the
7 challenged enhancements finding support in the record,
8 support from the testimony by Special Agent Macfarlane,
9 which is, again, included and incorporated by reference
12:20:14 10 herein in front of the Court today for all of the bases for
11 the loss amounts. That was incorrectly calculated to 43 --
12 or to 48 actually, reduced to 43, and then, again, to 38.

13 Again, as the Court had described as technical or a
14 legal reduction, this was not a reduction for anything
12:20:36 15 inherent in the defendant's presentence report, in the
16 arguments made at the original sentencing. It reflected his
17 level of guilt as he was -- as the facts developed at a
18 trial supported his guilt with a -- was at that time 43,
19 reduced to 38, and that reduction of five levels was, again,
12:21:01 20 to get him to the range that included the statutory maximum.

21 The Court then did grant a 19-month -- essentially a
22 19-month reduction, recognizing his proffers, which didn't
23 result in a plea.

24 The Government would argue that starting at a 37, you
12:21:21 25 know, those 19 months are functionally a two-level

1 reduction, which could be a 36, it could be a 35. A 35 -- a
2 Level 35 is 168 to 210, which is inclusive of the original
3 192 months found by the Court.

4 So even if the Court were today to credit him the same
12:21:39 5 two levels for proffering as they did at the original
6 sentencing, that two levels would result in a similar
7 guideline -- or an inclusive guideline range of 192 months,
8 which was then enhanced by the one single 1028A, 24 months
9 under 1028A, like I said.

12:22:00 10 The Government argues that that calculation of 216
11 months is not just a paper victory. It's not an easy quick
12 regurgitation. It's a fair and accurate representation of
13 the defendant's role, the defendant's guilt, and the facts
14 that were developed at trial.

12:22:18 15 And, if anything, Your Honor, since the Bayrob Group
16 was taken down, since the Bayrob Group was prosecuted in
17 this court, the techniques and the processes that they
18 developed and that they used have only enhanced and only
19 increased in society.

12:22:33 20 The type of malware that was developed by the Bayrob
21 Group, while, you know, nowadays, eBay fraud is not as, sort
22 of hot of a topic in the cyber world. It -- the
23 sophistication that was developed by the Bayrob Group served
24 as sort of the basis for the ransomware and the very
12:22:57 25 pernicious malware that has since been developed.

1 The idea of the Bayrob Group, you know, copying and
2 downloading entire servers and spoofing Web pages to control
3 computers is something that is now much more commonplace in
4 the sorts of malware and ransomware that is attacking
12:23:19 5 schools, hospitals, governments on a regular basis.

6 The level of sophistication with the money laundering
7 techniques used by the Bayrob Group, and the defendant
8 specifically, have only increased. And the use of
9 cryptomining currency that the defendant himself was very
12:23:37 10 interested in his 2013 Twitter page, talking about Y pool,
11 is now the daily, sort of the coin of the realm, if you
12 will -- no pun intended -- of cybercriminals. It's now --
13 ransomware is now dealing almost exclusively in the sort of
14 cryptocurrencies and electronic currencies that the
12:24:01 15 Bayrob Group, as early as 2013, were using.

16 So, Your Honor, a sentence of 216 months is still a
17 very relevant, still a very important sentence to levy
18 because it shows that even now, six years later -- six
19 years? -- seven years later, after the initial takedown,
12:24:21 20 these defendants are still doing the things -- or the --
21 that are reflected in society. And that, in fact, the
22 threat matrix that exists is firmly rooted in the foundation
23 of what we're seeing in the Bayrob Group. That this sends
24 an appropriate message to future criminals that, in fact,
12:24:41 25 they will be punished appropriately and proportionately, and

1 that's why the Government is continuing to ask for the 192
2 months, be it Level 37, 36, or 35, plus the 24 months
3 consecutive for the 11028A [sic].

4 And, Your Honor, the Government is not so cold and
12:24:59 5 heartless and immune to what we think is a heartfelt apology
6 by Mr. Miclaus. But the Government would also argue that
7 the 1028As were based on five victims in the Northern
8 District of Ohio, who came here and testified, and had just
9 as much of a heart-wrenching story to tell the Court as
12:25:22 10 Mr. Miclaus presented today. And that the need to protect
11 victims both in our district and nationwide, and, in fact,
12 with groups like this worldwide, is a very urgent and
13 important factor in this sentencing.

14 And that's why, again, we recommend the 216 months,
12:25:36 15 along with the finding of joint and severable liability for
16 restitution.

17 Thank you, Your Honor.

18 THE COURT: You get the last word, Mr. O'Shea.

19 MR. O'SHEA: Thank you, Judge. Thank you very
12:25:45 20 much.

21 First of all, I've never heard a prosecutor get up and
22 say they're trying to hold a defendant who's been in prison
23 for a long time accountable for actions of people while they
24 were in prison. That's a first for me. But I understand
12:25:59 25 the academics of it. But it's just unfair to say it's his

1 fault what other people are out on the street doing right
2 now.

3 Obviously, as we know, the programmer in this case,
4 MasterFraud, was Mr. Nicolescu and not my client. So to
12:26:14 5 hold him accountable for all the software, the evilware
6 that's out there ain't fair to him. He had a different
7 role. Okay? I know I'm talking academics.

8 Now, last but not least, I was going to point out --
9 assuming that I had the last word here -- is that the
12:26:31 10 Government -- and I'm hearing -- I think what I'm hearing is
11 that the Government is not objecting to this Court carrying
12 forward the 19-month variance. Here's what I mean: What I
13 did not see in the appeal was that the Government
14 cross-appealed about any argument that the variance was
12:26:48 15 inappropriate. So they kind of waived that academically,
16 and they have to waive it up to today. But I think they
17 have -- I don't know if it's clear from what I heard
18 Mr. Brown just say, but that was never appealed, Judge. So
19 that's kind of as much in the cement as all the other things
12:27:08 20 that were affirmed by the Court of Appeals.

21 Thank you.

22 THE COURT: Normally, I don't give a
23 sur-reply, but I'll allow it here.

24 MR. BROWN: Well, Your Honor, I think that --
12:27:18 25 again, that departure down to 38 was just to get within an

1 inclusive range for 240 months. With 37, we're at 210 to
2 262, which is really 210 to 240.

3 So I don't think that those departures to get to 38
4 have any, again, nonmechanical bearing in this case, and you
12:27:38 5 know, the Government's argument -- I'm glad I'm the first.
6 I'm glad with Mr. O'Shea's illustrative career, I can still
7 surprise him, you know, that Mr. Miclaus' actions serve as a
8 beacon on this shiny city on a hill, that's his fault. He
9 engaged in coconspirators in a very, very sophisticated
12:27:59 10 crime. His bad acts and his bad actions should continue to
11 serve as a deterrence nationwide and worldwide.

12 THE COURT: And I apologize. I should have
13 asked you a very narrow question.

14 Mr. O'Shea is indicating that you are not objecting to
12:28:14 15 a variance. Now, I know his argument is, it should be more
16 of a variance than what I originally gave, but is he
17 correct, you are not objecting to a variance by requesting
18 the same sentence?

19 MR. BROWN: That's correct. You're correct,
12:28:34 20 Your Honor, and I apologize if I was not clear.

21 We're still asking for 192 months, whether it's in 37,
22 which would be below, or 36 or 35, Level 36 or 35, which
23 would be a two-level variance down. We'd still be asking
24 for that 192. So at Level 35, which is 168 to 210, we're
12:28:56 25 asking for the sentence of 192 months.

1 THE COURT: Okay. So we all understand, we
2 are at a 37 and a I. The 192, the first -- the first
3 offense level to incorporate that would require a one-level
4 downward variance.

12:29:16 5 MR. BROWN: Correct, Your Honor.

6 THE COURT: I just want to make sure we are
7 all in agreement.

8 MR. BROWN: That's correct.

9 THE COURT: And you are not objecting to a
12:29:23 10 variance?

11 MR. BROWN: That's correct, Your Honor.

12 THE COURT: All right. All right.

13 And, of course, I always give the defendant the last
14 word, so because I called on the Government, is there
12:29:33 15 anything else, Mr. O'Shea?

16 MR. O'SHEA: Said enough, Judge.

17 Thank you.

18 THE COURT: All right. It is the judgment of
19 this Court, sir, that you be committed to the custody of the
12:29:40 20 Bureau of Prisons to be in prison for a term of 192 months
21 on Counts 1 through 13, and 21 --

22 MR. BROWN: Your Honor, 13. It's supposed to
23 be 15. One to 15. Right?

24 THE COURT: No. No, I'm not done.

12:30:00 25 MR. BROWN: Okay. Sorry.

1 THE COURT: 192 on Counts 1 to 13; 60 months
2 on Count 14; 120 months on Count 15 because of the statutory
3 maximums, all to be served concurrently. And 24 months on
4 each of Counts 16 to 20 to be served concurrently with each
12:30:32 5 other, but consecutively with all other counts, for a total
6 of 216 months.

7 Are you with me, Mr. Brown?

8 MR. BROWN: I am. Sorry. I apologize,
9 Your Honor.

10 THE COURT: That's all right.

11 MR. BROWN: Math was never my strong suit.

12 THE COURT: That's all right.

13 Mr. O'Shea, any objection to the restitution?

14 MR. O'SHEA: No objection to the restitution,
12:31:05 15 Judge.

16 THE COURT: I am going to order restitution in
17 the amount of \$853,651.99. That's a joint and several
18 obligation with any and all codefendants. It must be paid
19 at a rate of 25 percent of your gross monthly income, sir,
12:31:25 20 through the Federal Bureau of Prisons Inmate Financial
21 Responsibility Program.

22 Any balance -- if there is a balance, payment is to
23 commence no later than 60 days following release from
24 imprisonment, and you must pay it at the rate of no less
12:31:44 25 than 10 percent of your gross monthly income.

1 And I apologize. Before I got into restitution, I
2 should have stated, upon release from imprisonment, the
3 defendant is placed on supervised release for a term of
4 three years on Counts 1 to 15, one year on Count 21 --
12:32:09 5 strike that.

6 Three years on Counts 1 to 15 and 21, one year on
7 Count 16 to 20, all to run concurrently.

8 Within 72 hours of release from the custody of the
9 Bureau of Prisons, you must report in person to the
12:32:24 10 probation office in the district to which you are released.

11 I am not ordering a fine, but there is a \$2,100
12 special assessment due and payable today.

13 While on supervision, sir, you must comply with all of
14 the mandatory and standard conditions that have been adopted
12:32:41 15 by this Court. They are set forth in Part D of the report.

16 In addition, I'm ordering all of the same conditions
17 that I ordered at the original sentencing. I incorporate
18 all of them herein.

19 Mr. O'Shea, would you like me to recite them today?

12:32:59 20 MR. O'SHEA: No, Your Honor.

21 THE COURT: And, Mr. Brown, Mr. McDonough, do
22 you wish for me to recite them?

23 MR. BROWN: No, thank you.

24 Thank you, Your Honor.

12:33:08 25 THE COURT: Let me inform you, sir, that you

1 do have the right to appeal your conviction and sentence.
2 If you cannot afford to appeal, the cost will be borne by
3 the Government.

4 I do, in fact, find the sentence to be sufficient, but
12:33:19 5 not greater than necessary, to satisfy the purposes of
6 sentencing.

7 I have, in fact, concluded that the original sentence
8 is, once again, the appropriate sentence, and that is after
9 a de novo review.

12:33:34 10 I will indicate that I believe the loss amount was a
11 conservative amount, and the defendant could very well have
12 received more levels had the Government wished to argue for
13 more. I incorporate all of my further reasoning that I gave
14 at the original sentencing.

12:34:07 15 And specifically, sir, I gave the reasons as set forth
16 on page 159, and during that, I refer -- I referred you to
17 my -- the reasons I gave for Mr. Nicolescu's sentencing, and
18 those reasons are set forth on pages 133 and 134 of the
19 original transcript.

12:34:34 20 And let me read that reasoning now into the record,
21 and it's the same reasoning that I give today.

22 "I do consider this to be a very serious scheme that
23 warrants a very serious sentence. The defendant victimized
24 a large number of people from another continent. The
12:34:58 25 complexity of the scheme allowed the defendant's criminal

1 behavior to continue unabated for nearly a decade.

2 "I find that tremendous resources had to be used from
3 a number of governments, as well as private sector forensic
4 computer experts. They were all expended in an effort to
12:35:17 5 capture this defendant and others and stop them from
6 victimizing even more people.

7 "And, frankly, I see many defendants come before who
8 simply have little or no chance of achieving in life due to
9 their circumstances.

12:35:30 10 "But, you, sir, are very different. You were given
11 the gifts of tremendous intelligence and skill, and instead
12 of using those gifts for good, you chose a path of crime.
13 And you did it because of greed.

14 "You did not want to work hard enough to earn money
12:35:49 15 honestly. But you certainly had the ability to do so.

16 "I also find that a lengthy sentence is appropriate in
17 order to protect the public from further crimes and to deter
18 similar conduct. Such a sentence is necessary to send a
19 message to others like the defendant, who operate well
12:36:08 20 planned and what I call heartless computer crimes.

21 "I want to send the message that if you engage in this
22 conduct, you are going to be caught and justice will be
23 served. And when you are caught, the consequences are very
24 serious."

12:36:23 25 It is for those reasons that I found at the original

1 sentencing and I find at this sentencing that the sentence
2 is sufficient, but not greater than necessary, to satisfy
3 the purposes of sentencing.

4 Now, I did identify the mitigating factor of the
12:36:49 5 defendant having -- the defendant did, in fact, give a
6 proffer. That mitigating factor still exists today, and
7 that is why I have given Mr. Miclaus a one-level variance.

8 I am compelled, Mr. O'Shea, to address your argument
9 here in court and in your briefing regarding the six levels
12:37:23 10 that the Sixth Circuit took off.

11 But I originally gave a five-level downward departure
12 for purely legal, technical reasons. The resulting
13 guideline range originally was above the statutory maximum.
14 Had I known that those six levels were inappropriate, I
12:37:54 15 would not have been required to depart downward and
16 certainly would not have done so. I then gave Mr. Miclaus
17 the variance as stated in my opinion.

18 So the question is, does the defendant deserve a
19 further variance based upon the Sixth Circuit opinion and
12:38:20 20 based upon all of the totality of the circumstances? And my
21 answer has to be no. The defendant received a total
22 sentence that this conduct deserves.

23 Mr. O'Shea, first of all, sir, any objections?

24 MR. O'SHEA: Other than the arguments that
12:38:40 25 I've made acknowledging your ruling, Your Honor, no.

1 THE COURT: And is there anything further?

2 MR. O'SHEA: Judge, just for the record, we
3 originally, in our original brief, indicated that there was
4 a potential application of the First Step Act, as we said in
12:38:57 5 our supplemental brief. We found that not to be the case.

6 Just wanted to be clear that we were -- as soon as we
7 found out about how the law really works, we notified the
8 Court as fast as we could.

9 THE COURT: And, Mr. O'Shea, when we had our
12:39:14 10 conference call, I indicated to you, I simply did not
11 understand what you were asking of me. I now understand
12 what you were getting at.

13 How about if I just leave it at that?

14 MR. GOLDBERG: Fair enough, Judge.

12:39:31 15 THE COURT: Mr. Brown, Mr. McDonough, first of
16 all, gentlemen, any objections?

17 MR. BROWN: No objections, Your Honor.

18 Thank you.

19 THE COURT: And secondly, anything further?

12:39:37 20 MR. BROWN: Nothing further from the
21 Government.

22 Thank you, Your Honor.

23 THE COURT: All right. Mr. Miclaus, I really
24 wish you the best.

12:39:45 25 Good luck to you, sir.

1 We're in ajournement, folks.

2 - - -

3 (Proceedings adjourned at 12:40 p.m.)

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5

6 C E R T I F I C A T E

7

8 I certify that the foregoing is a correct transcript
9 from the record of proceedings in the above-entitled matter.

10

11

12 /s/ Donnalee Cotone 10th of February, 2023
13 DONNALEE COTONE, RMR, CRR, CRC DATE
14 Realtime Systems Administrator

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